

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5910 OF 2004

Kusum Satyanarayan Sureka		Petitioner
Vs.		
Amrish Rasiklal Shah & Anr.		Respondents

Sarvasri R.D. Dhanuka with V.S. Khemka
and Ms Bharati Goyal for the Petitioner.

None present for the Respondents.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: NOVEMBER 22, 2004

P.C:

1. Heard the learned Advocate for the petitioner. Notice was issued to the respondents for final disposal of the matter at the admission stage. However, inspite of service of notice, none has appeared for the respondents.

2. Perusal of the impugned order and the petition discloses that the trial Court has refused to condone the delay in filing the written statement by placing reliance in the decision in the matter of **M. Sagar s/o Chainnayya v. Saud Akhtar Khan s/o late Abdul Hamid Khan**, reported in 2004 (2) All M.R. 384. Undisputedly, there has been delay of about 8-9 months in filing the written statement.

3. In **M. Sagar's** case (supra), the learned single Judge of this Court while dealing with the question as to whether consequent to the amendment to the C.P.C., the Court has power to accept the written statement filed later than 90 days prescribed under Order 7 of the Code from the date of service of the summons has held that though the time limit prescribed by Order 8, Rule 1 of the Code does not apply to the written statement not filed, the Court while considering the grant of time to file the written statement in pending suits must have regard to the time limit prescribed by Order 8, Rule 1 of the Code and the provisions of Order 8, Rules 9 and 10 of the Code and secondly, the written statement can be accepted by the Court even in other cases in accordance with the provisions of Rules 9 and 10 of the Code, beyond the period prescribed therefor. However, as regards the issue as to whether the defendant can be permitted to file the written statement after the period of 90 days prescribed by Order 8, Rule 1, having regard to the provisions of Rules 9 and 10 of Order 8 of the C.P.C., the issue was sought to be referred to the larger Bench. That was a decision passed on 19-12-2003. Subsequently however, the Division Bench in **Chintaman Sukhdeo Kaklij & others v. Shivaji Bhausaheb Gadhe & others**, reported in 2004 (5) Bom.C.R. 573 has held that:-

"... Rules 9 and 10 of Order 8 of C.P.C. give discretion to the trial Court to allow the defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8, Rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8, Rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances."

4. In the case in hand, it was the case of the petitioner that the petitioner is an old lady and she had misplaced the documents relating to the property and therefore she had to obtain the certified copies of such documents from the registration office and it consumed lot of time in that regard. It is pertinent to note that the application disclosing the said facts being the

cause for the condonation of delay in filing the written statement, was not objected to by the respondents and, on the contrary, a specific endorsement to the effect that there was no objection to file the written statement was endorsed on behalf of the plaintiff on the said application.

5. The facts that the petitioner is an old lady and the relevant documents to put forth her defence in the matter were misplaced and not available in time and she had to obtain the certified copies of the said documents from the registration office were not in dispute and the same itself discloses that there was sufficient cause for the condonation of delay in filing the written statement and that being the special circumstance which was sufficient to exercise the discretion by the trial Court in favour of the petitioner to allow the petitioner to place her written statement on record even beyond the period prescribed under the provisions of law.

6. Perusal of the impugned order discloses that the trial Court instead of applying its mind in that regard, merely by referring to the decision in M. Sagar's case and the provision of Rule 9 of Order 8 has rejected the application which apparently discloses that the trial Court has failed to exercise its discretion judiciously

and in the manner it ought to have been exercised in the facts and circumstances of the case and this clearly justifies interference in the impugned order. In normal course it would have been appropriate to remand the matter to reconsider the application by the trial Court. However, in the peculiar set of facts where the respondent has not objected to the filing of the written statement and as the facts disclose sufficient cause for condonation of delay in filing the written statement, and in such circumstances, the remedy would further delay the proceedings in the suit and virtually defeat the very purpose of the provision of law comprised under Rule 9 of Order 8 of the C.P.C., it would be just and appropriate to direct the trial Court to allow the petitioner to place the written statement on record and to proceed with the matter in accordance with the provisions of law thereafter.

7. Hence, the petition succeeds. The impugned order is hereby quashed and set aside. The petitioner is permitted to place the written statement on record and the trial Court is directed to take the same on record and thereafter proceed with the matter in accordance with the provisions of law. The petition is disposed of with the above directions with no order as to costs.
